



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: DECEMBER 13, 2022

IN THE MATTER OF:

Appeal Board No. 626298

PRESENT: GERALDINE A. REILLY, MEMBER

In Appeal Board Nos. 626296, 626297 and 626298, the Board, on its own motion pursuant to Labor Law § 620 (3), has reopened and reconsider the decisions of

the Administrative Law Judge, filed June 6, 2022, that sustained the initial determination disqualifying the claimant from receiving benefits, effective October 8, 2021, on the basis that the claimant voluntarily separated from employment without good cause; overruled the initial determination charging the claimant with an overpayment of \$2,110.50 in benefits recoverable pursuant to Labor Law § 597 (4); and sustained the initial determination reducing the

claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$316.57 on the basis that the claimant made a willful misrepresentation to obtain benefits, as modified to reduce the forfeit penalty to four effective days only with no civil penalty. The initial determination, disqualifying the claimant from receiving benefits, effective October 8, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 8, 2021 cannot be used toward the establishment of a claim for benefits, was not ruled upon.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer, a private medical office, as the lead nurse for 21 years. Her last day of work was September 7, 2021.

In August, the employer notified all employees that they must receive the COVID-19 vaccine by September 27, 2021, or their employment would be terminated. The claimant was not scheduled to work on September 8. That day, she received an email from the office manager, advising her that that she had to quarantine for 10 days because she had been exposed on the preceding day to a coworker who had COVID-19. The claimant was scheduled to return to work on September 20 when her quarantine ended. She was not paid for the quarantine period.

On September 20, the office manager informed the claimant that she could not return to work until she received the COVID-19 vaccine. The claimant had not yet made the decision to get vaccinated but was considering the Johnson & Johnson vaccine. She protested that she should be able to return to work because she had until September 27 to get vaccinated, but the employer refused to let her return. The employer also removed the claimant from the work schedule that day and advised the claimant's coworkers that the claimant no longer worked there. This information was communicated to the claimant.

After her job ended, the claimant filed a claim for benefits in early October. When asked the reason for her separation, she said, "lack of work." Thereafter, she received \$2,110.50 in benefits.

OPINION: The credible evidence establishes that the employer discharged the claimant on September 20, 2021, because she remained unvaccinated at the end of an unpaid quarantine. The only evidence in the record is the claimant's uncontradicted testimony, which is not inherently incredible. As the employer's deadline for mandatory vaccination had not yet expired, we find that the claimant did not quit her job or provoke her discharge by remaining unvaccinated at that particular time. We further find that under these circumstances, her actions do not constitute misconduct. While it was the employer's prerogative to discharge her, the claimant's separation occurred under nondisqualifying conditions.

The claimant therefore is entitled to benefits and was not overpaid. In addition, she did not make a wilful false statement in connection with her

claim. We note that the determination of wilful misrepresentation is premised on the claimant's alleged failure to advise the Department of Labor that she had quit and indicating instead that her employment ended due to a lack of work. As the claimant did not quit, she cannot be subject to penalty for the reason stated in the determination. We cannot consider whether her failure to state that she was discharged is a wilful false statement, as that particular question is not before us.

DECISION: The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed in part and reversed in part.

In Appeal Board No. 626296, the initial determinations, disqualifying the claimant from receiving benefits, effective October 8, 2021, on the basis that the claimant voluntarily separated from employment without good cause and, in the alternative, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 8, 2021 cannot be used toward the establishment of a claim for benefits, are overruled.

In Appeal Board No. 626297, the initial determination charging the claimant with an overpayment of \$2,110.50 in benefits recoverable pursuant to Labor Law § 597 (4), is overruled.

In Appeal Board No. 626298, the initial determination reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$316.57 on the basis that the claimant made a willful misrepresentation to obtain benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER